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No. 98- ___

IN THE

Supreme Court of the United States

October Term, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioner,

v.

ANIMAL LEGAL DEFENSE FUND, INC., *et al*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether emotional distress felt by an individual on observing primates exhibited in a zoo constitutes judicially cognizable aesthetic injury-in-fact for purposes of establishing Article III standing?

(2) Whether an allegation that the plaintiff's emotional distress results from the government's failure to prohibit actions by private parties is sufficient to satisfy the causation and redressability elements of Article III standing?

PARTIES TO THE PROCEEDING

Petitioner is the National Association for Biomedical Research. Respondents are the Animal Legal Defense Fund, Roseann Circelli, Mary Eagan, and Marc Jurnove. The United States Department of Agriculture, the Secretary of Agriculture, and the Administrator of the Animal and Plant Health Inspection Service are also respondents.

RULE 29.6 LISTING

Petitioner is a nonprofit corporation qualified for tax exempt status under 26 U.S.C. § 501(c)(6). It has no parent companies and no nonwholly owned subsidiaries. Its members include nonprofit institutions and business corporations which operate biomedical research facilities regulated under the Animal Welfare Act.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-___

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

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ANIMAL LEGAL DEFENSE FUND, INC. *et al.*,

Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

The National Association for Biomedical Research ("NABR") petitions this Court for a Writ of Certiorari to review the decision rendered by the United States Court of Appeals for the District of Columbia Circuit sitting *en banc*.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals *en banc* are reported at 154 F.3d 426 (D.C. Cir. 1998) and are set forth in the Appendix ("App.") at App. 1a-49a. The original panel opinions are reported at 130 F.3d 464 (D.C. Cir. 1997) and are set forth in the Appendix at App. 84a-103a. The opinion of the United States District Court for the District of

Columbia is reported at 943 F. Supp. 44 (D.D.C. 1996) and is set forth in the Appendix at App. 50a-83a.

STATEMENT OF JURISDICTION

Plaintiffs in this case sought declaratory and injunctive relief pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* Subject matter jurisdiction was based on 28 U.S.C. § 1331. The court of appeals entered its judgment on September 1, 1998. On November 20, 1998, petitioner requested, pursuant to 28 U.S.C. § 2101(c) and Rule 30.2 of this Court, a 30-day extension of time in which to file the present petition. The Chief Justice granted that request on November 24, 1998, extending the time allowed for filing a petition for a Writ of Certiorari to and including December 30, 1998. This Court has jurisdiction to consider this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following statute and regulation, set forth in the Appendix, are involved in this case:

1. 7 U.S.C. § 2143(a)

2. 9 C.F.R. § 3.81

STATEMENT OF THE CASE

By a 7 to 4 vote, the District of Columbia Circuit sitting *en banc* held that respondent Marc Jurnove had established Article III standing on a claim of aesthetic injury derived from the emotional distress he claimed to have suffered upon seeing primates exhibited in zoo housing that he considered inhumane. Mr. Jurnove, with others, challenged a regulation the United States Department of Agriculture ("USDA") had promulgated to implement its statutory mandate to establish "minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates." *See* 7 U.S.C. § 2143(a). The case presents the important question whether a plaintiff's subjective psychological reactions to viewing animals or environmental conditions may give rise to constitutionally cognizable injury-in-fact. The issue is worthy of this Court's review at this time because the majority opinion below enlarges standing well beyond the metes and bounds established in this Court's prior decisions, conflicts at least in principle with decisions of other courts of appeals that have declined to find aesthetic injury on the basis of emotional distress alone, and was rendered in the circuit where most actions challenging federal regulations may be brought. Furthermore, by finding causation and redressability present even when the injury alleged is subjectively determined and ultimately unverifiable, the majority below would open the federal courts for resolution of disputes of taste and ideology rather than actual cases and controversies.

I. The Regulation at Issue

The regulation at issue in this case, 9 C.F.R. § 3.81, was promulgated pursuant to 1985 amendments to the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* (the "AWA" or the "Act"). The AWA directs the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors" and provides that such standards "shall include minimum requirements" for, among other things, "a physical environment adequate to promote the psychological well-being of

primates." 7 U.S.C. § 2143(a). The regulation requires every regulated facility housing primates to

> develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate professional journals or reference guides, and as directed by the attending veterinarian.

Section 3.81 specifies that each required plan "must include specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature," in accordance with "currently accepted professional standards." 9 C.F.R. § 3.81(a). Exceptions to "social grouping" are permitted only in specific circumstances enumerated in the regulation.[1] In addition, "primary enclosures must be enriched by providing means of expressing noninjurious species-typical activities," such as perches, swings, mirrors, objects to manipulate, opportunities to forage or "other increased cage complexities." *Id.* § 3.81(b). Other detailed regulations, which respondents did not challenge, govern the sanitation, lighting, temperature, physical safety, health, feeding, and water supply of the primates. *See* 9 C.F.R. §§ 3.75-3.92.

II. Respondent Jurnove's Claimed Injury

Respondent Jurnove, three other individual plaintiffs, and the Animal Legal Defense Fund ("ALDF") filed an action for declaratory and injunctive relief in the United States District Court

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[1] Exceptions are permitted only if the "primate exhibits vicious or overly aggressive behavior, or is debilitated as a result of age or other conditions (e.g., arthritis)," or is suspected of having a contagious disease. *Id.* §§ 3.81(a)(1), 3.81(a)(2). When such an exception exists, the primate's housing must still permit it to "see and hear nonhuman primates of [its] own or compatible species unless the attending veterinarian determines that [this] would endanger [its] health, safety, or well-being." *Id.* § 3.81(a)(3).

for the District of Columbia on March 5, 1996. The original defendants were the United States Department of Agriculture, the Secretary of Agriculture, and the Administrator of the Animal and Plant Health Inspection Service. The Amended Complaint allegeD that the USDA failed "to adopt specific, minimum standards to protect primates' psychological well-being" and "instead delegated this responsibility to regulated entities by requiring that regulated entities devise 'plans' for this purpose." 154 F.3d at 430, App. 5a.[2]

Respondent Jurnove premised his standing on his psychological reaction to the conditions of animals exhibited at the Long Island Game Farm, a private zoo facility in New York State. He first visited this zoo in May 1995 in his "capacity as an equine investigator." 154 F.3d at 439 n.9 (citing Jurnove Affidavit ¶ 7), App. 21a. While there, he became concerned about the conditions of numerous animals housed in the zoo. His affidavit states that those conditions constituted "'an assault on [his] senses that greatly impaired [his] ability to observe and enjoy'" the animals. 154 F.3d at 432 (quoting Jurnove Affidavit ¶ 17), App. 8a.

Mr. Jurnove returned to the Game Farm repeatedly over a six month period for the purpose of photographing what he had seen and otherwise documenting complaints he submitted to USDA inspectors. 154 F.3d at 429-30 (citing Jurnove Affidavit ¶¶ 18-30), App. 4a-5a. He returned again in April 1996, "believing that it would be an enjoyable trip because of all the improvements that would have been made as a result of USDA's September, 1995 inspection, which [he] had been responsible for. To [his] dismay and sadness, [he] saw the animals in literally the same

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[2] The ALDF also alleged that the USDA violated the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, by failing to provide adequate opportunity for comment on its decision to allow regulated entities to keep their plans at their own facilities (rather than submitting them to the USDA). The original court of appeals panel held that ALDF lacked standing to press this claim, 130 F.3d at 470-71, App. 91a-93a, and the court did not include the issue in its *en banc* proceeding.

conditions as [he] had seen them over the summer of 1995." Jurnove Affidavit ¶ 33; *see also* 154 F.3d at 430, App.5a.

Many of the conditions recounted in Mr. Jurnove's affidavit involved animals other than primates and constituted the basis for the portion of the Amended Complaint that sought judicial intervention in USDA's enforcement activities under the Animal Welfare Act – a claim for relief that the district court rejected and that is no longer in the case. *See* 943 F. Supp. at 62-64, App.78a-81a. The conditions that provided the basis for the decision below that Mr. Jurnove has standing to challenge the legality of 9 C.F.R. § 3.81 were these:

- He observed two primates housed individually, one "a Japanese Snow Macaque [housed] in a cage 'that was a distance from and not in view of the other primate cages,'" the other "'a large male chimpanzee named Barney in a holding area by himself [and apparently unable to] see or hear any other primate.'" 154 F.3d at 429 (quoting Jurnove Affidavit ¶¶ 14, 8), App. 3a.

- He observed two squirrel monkeys which, although housed together, were kept in a shelter adjacent to a pen containing two bears, which, Mr. Jurnove believed, caused the squirrel monkeys to "act . . . very upset." *Id.* at 429, 439 (citing Jurnove Affidavit ¶ 11), App. 4a, 21a.

- He observed that "'[t]he only cage enrichment device [the Japanese Snow Macaque] had was an unused swing.'" *Id.* at 439 (quoting Jurnove Affidavit ¶ 14), App. 21a.

In his affidavit, Mr. Jurnove asserts that the conditions he observed violated the Secretary's regulations. *See* App. 42a (quoting Jurnove Affidavit ¶¶ 19, 21, 41). In the Amended Complaint, in contrast, the plaintiffs alleged that "the conditions that caused Mr. Jurnove aesthetic injury complied with current USDA regulations, but . . . lawful regulations would have prohibited those conditions and protected Mr. Jurnove from the injuries that he describes in his affidavit." 154 F.3d at 430, App. 5a.

III. The Proceedings Below

The district court granted the plaintiffs' motion for summary judgment, holding that three individual plaintiffs had standing,[3] invalidating the challenged regulation, 9 C.F.R. § 3.81, and ordering the USDA to promulgate a new regulation. 943 F. Supp. at 53-57, App. 61a-70a.

Petitioner National Association for Biomedical Research ("NABR"), a nonprofit trade association whose members include approximately 350 nonprofit institutions and business corporations engaged in biomedical research, thereafter intervened as a defendant in the district court. NABR and the federal government defendants appealed to the Court of Appeals for the District of Columbia Circuit.

A divided panel of the court of appeals reversed and remanded on December 9, 1997. The panel majority held, per Judge Sentelle, that the individual plaintiffs had not met their burden of demonstrating that their claimed injuries were "fairly traceable" to USDA's alleged failure to promulgate "minimum requirements" as mandated by the AWA, and that the "aesthetic" injuries claimed, even if they amounted to cognizable injuries-in-fact (which was "not apparent"), were "not likely to be redressed by the relief sought in this case." 130 F.3d at 468, App. 88a. Judge Wald dissented as to the standing of Mr. Jurnove, but did not address the merits of his claim. *Id.* at 471, App. 93a.

On March 10, 1998, the court of appeals granted rehearing *en banc*, limited to the question of Mr. Jurnove's standing. On September 1, 1998, the court of appeals held by a 7-4 majority that Mr. Jurnove had standing to sue. The majority, per Judge Wald, concluded that Mr. Jurnove had "alleged injury to an aesthetic interest in observing animals living under humane conditions" sufficient to establish a cognizable injury-in-fact, 154 F.3d at 438,

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[3] A fourth individual alleged only that the USDA had failed adequately to enforce its regulations, and, as noted, the district court rejected that claim. 943 F. Supp. at 62-64, App. 78a-81a.

App. 19a, that he had established both the causation and redressability requirements for constitutional standing, *id.* at 443, App. 21a, 29a, and that he also fell within the "zone of interests protected under the AWA's provisions on animal exhibitions." *Id.* at 444, App. 31a. The merits of the case were left for decision by a three judge panel of the court.[4] *Id.* at 445, App. 32a.

The dissent, per Judge Sentelle, disagreed "[b]ecause . . . the majority significantly weakens existing requirements of constitutional standing . . . ." 154 F.3d at 446, App. 32a. Arguing that the majority's recognition of the "purely subjective injury" claimed by Mr. Jurnove "radically departs from our precedent," the dissent wrote that only "concrete and particularized" injuries are sufficient to constitute cognizable injury-in-fact. In analyzing the causation element of constitutional standing, the dissent concluded that Mr. Jurnove's affidavit failed to meet the burden of proving that it is "substantially probable" that the challenged acts of the defendant – as opposed, for example, to the acts of an independent third party – caused his injury. *Id.* at 450, App. 40a. The dissenting judges also believed that Mr. Jurnove's affidavit failed to show that his asserted "aesthetic injury" – inherently subjective and a matter of "the plaintiff's own taste" – could be redressed "by a general court order directing the government to try again." *Id.* at 454, App. 47a.

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[4] The court of appeals has not yet established a schedule for further consideration of the merits, and we are mindful of the fact that there has been no final decision on the merits in the court below. The jurisdiction of the court of appeals was properly invoked, however, and this petition for a Writ of Certiorari is timely. The Court therefore has jurisdiction to take the case. *The Conqueror*, 166 U.S. 110 (1897). Moreover, there is ample precedent for the Court's granting of the writ despite the possibility of continued proceedings below. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984) (granting writ to consider standing question where court of appeals had reversed the district court's ruling that plaintiffs lacked standing); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (same); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (same); *see also United States v. General Motors Corporation*, 323 U.S. 373 (1945) (granting the writ after the court of appeals remanded a case for a new trial).

REASONS FOR GRANTING THE WRIT

The prior decisions of this Court recognize that aesthetic injuries can establish Article III standing, but also insist that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982). In this case, the court of appeals found aesthetic injury-in-fact *solely* on the basis of a plaintiff's report of his emotional response to conditions he deems unacceptable.[5] Because the court of appeals' decision expands the boundaries of Article III standing in the circuit in which most challenges to agency action may be brought, there is a compelling need for this Court to determine whether a plaintiff's claim of aesthetic injury can ever rest on a claimed emotional response to the failure of a regulated entity to comply with his view of what the regulation should require.

At its heart, the dispute below, and the injury-in-fact issue presented by this petition, is whether a plaintiff must point to an injury that can be verified by reference to objective criteria ***or*** whether a plaintiff may instead gain access to the federal judicial system by pointing to an injury that is measured solely by his description of his own subjective emotional responses. The majority opinion below falls squarely on the side of permitting such subjective responses to constitute the basis for Article III standing. Similarly, the court of appeals' willingness to consider subjective emotional distress as a cognizable consitutional injury distorts the causation and redressability elements of Article III standing. The decision below thus expands the realm of cognizable injuries well beyond this Court's decisions and the decisions of other courts of appeals, in a way that broadly enlarges the class of plaintiffs having standing to contest a wide selection of agency actions.

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[5] *Compare, e.g., Fund for Animals v. Lujan*, 962 F.2d 1391 (9th Cir. 1992) (allowing standing based on "fewer opportunities to view wild bison as a result of the defendant's actions" even though injury alleged consisted in part of emotional distress upon seeing bison shot).

I. The Decision of the Court Below Distorts This Court's Aesthetic Injury Jurisprudence by Recognizing Unverifiable Subjective Emotional Harm as the Basis for Article III Standing.

A. Palpable Injury-in-Fact is a Required Element of Article III Standing.

Under Article III, § 2, of the Constitution, the judicial power of the federal courts extends only to actual "cases" and "controversies." Whether a plaintiff has a sufficient stake in a matter to obtain judicial resolution of a dispute is the threshold question in testing for constitutional standing to sue. *Sierra Club v. Morton*, 405 U.S. 727 (1972). To demonstrate the existence of a "case or controversy" within the meaning of Article III, a plaintiff must have suffered "injury-in-fact" that is "fairly traceable" to the actions of the defendant and must show that the injury in question is likely to be redressed by a favorable decision. *E.g., Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997); *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 663 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[6]

To prove injury-in-fact, a plaintiff must identify a legally cognizable interest subject to a "particularized," "palpable," and "imminent" invasion. *Defenders of Wildlife*, 504 U.S. at 560; *Allen v. Wright*, 468 U.S. 737, 761 (1984); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). The prior decisions of this Court have recognized the existence of an interest in observing "an animal species . . . for purely aesthetic purposes . . . ." *Defenders of Wildlife*, 504 U.S. at 562-63, *citing Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *see also Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 n.4 (1987). Accordingly, aesthetic harm can, on proper proof, give rise to the required

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[6] In addition to showing the three constitutionally-derived elements identified in the text, the plaintiff must satisfy a number of prudential standing requirements, including that his grievance arguably falls within the "zone of interests" protected or regulated by the provision of law invoked in his suit. *Bennett*, 117 S. Ct. at 1161.

injury-in-fact. *See United States v. Students Challenging Regulatory Agency Proceedings*, 412 U.S. 669, 686 (1973) ("*SCRAP*").

However, no prior decision of this Court or any court of appeals has found a cognizable aesthetic injury-in-fact in the absence of facts demonstrating a tangible threatened reduction in a plaintiff's opportunities to observe specific species of animals or specific environmental phenomena. For example, in *Japan Whaling*, the Court held that respondents had alleged sufficient injury-in-fact to their interest in watching and studying whales because of continued whale harvesting. *See* 478 U.S. at 230 n.4; *see also Didrickson v. Dept. of Interior*, 982 F.2d 1332 (9th Cir. 1992) (finding standing where sea otters were hunted); *Fund for Animals v. Lujan*, 962 F.2d 1391 (9th Cir. 1992) (finding standing where bison were shot); *Humane Society v. Hodel*, 840 F.2d 45 (D.C. Cir. 1988) (finding standing where migratory birds and game were hunted); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977) (finding standing where seals were killed), *cert. denied*, 434 U.S. 1013 (1978).

This Court has in addition firmly rejected the proposition that the "psychological consequence . . . produced by observation of conduct with which one disagrees" could ever constitute "an injury sufficient to confer standing." *Valley Forge*, 454 U.S. at 485. Recognizing as injury-in-fact the emotional "psychological consequences" of observing something with which one disagrees would inappropriately incorporate an element of radical subjectivity in federal jurisdictional analysis. A plaintiff could establish "injury-in-fact" so long as he *felt* injured by negative emotions such as the "sadness and dismay" of which Mr. Jurnove complains. Moreover, the rejection of "psychological consequences" as cognizable injury serves an important purpose linked to separation of powers; it prevents lawsuits brought by persons with a purely ideological stake in the outcome. *Cf. United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring).

There is, we submit, a substantial tension between the two Article III principles that "aesthetic injury" may, but

"psychological distress" may not, establish injury-in-fact. Every claim of aesthetic injury necessarily involves the plaintiff's psychological response to circumstances observed – but that response alone cannot rise to the level of constitutionally cognizable harm. *Valley Forge* necessarily requires more than subjective feelings to support a claim of aesthetic injury.

Until the decision below, the courts of appeals have uniformly recognized the requirement of *Valley Forge* that a plaintiff must describe more than his subjective feelings to show aesthetic injury-in-fact. The Fifth and Ninth Circuits have found standing in emotional distress cases only where the challenged government action changed the plaintiff's physical environment. In *Fund for Animals*, 962 F.2d at 1395-97, the Ninth Circuit held that emotional distress experienced by fund members on viewing the shooting of bison on property adjacent to theirs was a cognizable "psychological injury beyond a generalized concern for the bison's welfare" because the government action at issue had caused "a direct sensory impact of a change in [their] physical environment." The Fifth Circuit found an absence of injury in *Int'l Primate Protection League v. Administrators of the Tulane Educational Fund*, because the government "would produce no direct sensory impact on the plaintiff's own environment." 895 F.2d 1056, 1059 (5th Cir. 1990), *rev'd on other grounds*, 500 U.S. 72 (1991). The Fourth Circuit has suggested that a personal relationship between specific animals and the plaintiff, *predating* the controversy, might suffice to confer standing. *See International Primate Protection League v. Institute for Behavioral Research*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

Standing cases are rarely in direct conflict with one another in the sense of reaching opposing results on identical records; plaintiffs such as the respondents in this case repeatedly file suits that present varied fact patterns in the hopes of eventually identifying a plaintiff who demonstrates an injury sufficient to overcome the ban on generalized grievances and the rule, *see Sierra Club v. Morton*, 405 U.S. at 739, that a mere "interest in a matter" is insufficient to confer standing. This case is indeed the third occasion on which the ALDF has brought overlapping

groups of plaintiffs to federal court seeking standing to attack USDA animal welfare regulations with which it disagrees. *See Animal Legal Defense Fund v. Espy*, 29 F.3d 720 (D.C. Cir. 1994); *Animal Legal Defense Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994). In these three cases alone, a total of eight individuals, one business corporation, and three advocacy organizations have sought to establish standing to sue, all of them unsuccessfully until the *en banc* decision below. The Court appears to have recognized this aspect of standing litigation, for numerous standing cases have been reviewed and decided on a Writ of Certiorari with no mention made of a conflict among the circuits.[7]

This case nonetheless presents a clear conflict in legal rule applied by the circuits. Each of the cases in the Fourth, Fifth, and Ninth Circuits discussed above stands in conflict with the decision of the District of Columbia Circuit, at least in principle, in view of differing interpretations given to *Valley Forge*. This case stands out as the first and only federal appellate decision to make a finding of injury-in-fact where emotional harm alone – "an assault" on Mr. Jurnove's "senses" and his feelings of "dismay and sadness" – provided the only indication of any injury whatsoever. In sharp and telling contrast with the cited decisions of other circuits, the majority decision below never even cites *Valley Forge*.

B. The Decision Below is Wrong.

Mr. Jurnove's injury rests entirely on his claim that he suffered "an assault on his senses" on his first visit to the Long Island Game Farm and felt "dismay and sadness" on his final visit eleven months later. He does not and could not claim that he lacks ready opportunities to observe primates housed in conditions of which he approves at locations other than the Long Island Game Farm. He does not even claim any special interest in observing or studying primates. He went to the Long Island Game Farm as a

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[7] *See, e.g., Bennett v. Spear*, 117 S. Ct. 1154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

volunteer committed to animal welfare, *first* because he had been told equines were mistreated there, *then* to document the conditions he had observed, and *finally* in search of the satisfaction he would have experienced if his complaints had resulted in the changes he wanted to achieve. Mr. Jurnove's claim of injury accordingly rests exclusively on his own assessment of his emotional response to the conditions he saw on his visits to the Long Island Game Farm. The dissenters below were plainly correct in their conclusion that the majority opinion "recognizes an aesthetic injury based solely on a plaintiff's subjective emotional response to something he sees." 154 F.3d at 449, App. 39a. The majority decision therefore stands in flat contradiction of this Court's doctrine that cognizable injury *cannot* result from the "psychological consequence" of observing "conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. For that reason alone the decision below is wrong and should be reversed.

II. The Decision of the Court Below Distorts the Causation and Redressability Elements of Article III Standing.

The redressability element of Article III standing requires that a plaintiff show that it is "likely" (as opposed to merely "speculative") that his injury will in fact be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 561. The causation element provides that a plaintiff's injury must be "fairly trace[able] to the challenged action of the defendant." *Allen v. Wright*, 468 U.S. 737 (1984). When, as here, the plaintiff's alleged injury is entirely subjective, establishing these elements of Article III standing is inherently an exercise in speculation.

Due to the subjective nature of Mr. Jurnove's interest (only Mr. Jurnove knows what his precise tastes are) and the unverifiability of his injury (only Mr. Jurnove knows whether and to what extent he is emotionally distressed), respondents cannot show redressability. As the dissenting judges pointed out, there can be no assurance that a favorable judicial decision in this case will redress the asserted psychological injury. *See* 154 F.3d at 453-54, App. 46a-48a. Mr. Jurnove states, for example, that he was distressed by observing a primate with access to only a single

"unused" cage enrichment device. *See* 154 F.3d at 429 (citing Jurnove Affidavit ¶ 14), App. 3a. Would Mr. Jurnove's distress be alleviated by adding a second enrichment device? Would three devices be enough? What type of devices would be required? Would he measure the devices' efficacy by the amount of time a primate used them? Nothing in Mr. Jurnove's affidavit or elsewhere in the record provides guidance on these matters. Even if Mr. Jurnove felt that the number of enrichment devices was adequate, he might nevertheless suffer "sadness and dismay" if he did not perceive the particular devices as sufficiently engaging a primate's attention.

The same type of speculation inheres in Mr. Jurnove's other allegations of injury. Any type of "social grouping" requirement, and any set of exceptions to that requirement, might fail to save Mr. Jurnove from "sadness and dismay" or other psychological distress. Would Mr. Jurnove approve an exception for primates that are ill, or aged, or that live alone in nature? Is housing in pairs sufficient, or would larger groupings be required to relieve his distress? Here again, the record is silent. Similarly, any set of rules about separating primates from other "incompatible" animals might fail to relieve Mr. Jurnove's negative response. If Mr. Jurnove is the sole judge of whether a particular way of treating animals causes him distress, there is no basis for concluding that a judicial decision in his favor is "likely" to redress his injury.[8]

As the dissent below pointed out, similar considerations apply to the causation element of Article III standing. *First*, Mr. Jurnove's affidavit alleges that the conditions that distressed him violated the Secretary's existing regulations. *See* App. 42a. If that is so, the regulations are not the cause of Mr. Jurnove's psychological injury.[9] *See* App. 44a. *Second*, it stretches the

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[8] Indeed, Mr. Jurnove himself may not know whether a particular set of conditions will cause him psychological or emotional distress until he actually experiences those conditions.

[9] To the extent Jurnove's complaint is really about the USDA's failure to enforce Section 3.81, it fails as a matter of administrative law, since enforcement actions

concept of causation beyond all reasonable limits to hold that government "causes" all the actions of private parties that it fails to prevent.[10] *Third*, and closely related to the two points just made, the statute instructs the Secretary to set "minimum requirements" that are "adequate to promote the psychological well-being or primates." *See* 7 U.S.C. § 2143(a). To the extent that Mr. Jurnove's psychological distress is caused by conditions that meet or exceed "minimum requirements," his injury cannot have been caused by the Secretary's allegedly unlawful regulation. The subjective nature of Mr. Jurnove's injury makes it virtually impossible to determine whether his psychological distress was caused by the Secretary's failure to do what the statute requires, or by a failure to do *more* than the statute requires. The nature of the plaintiff's alleged injury pushes the standing theory of the court below into the realm of impermissible speculation.

III. The Court of Appeals' Standing Analysis Has Broad Potential Consequences for Scientific Research and in Other Contexts.

The decision below has broad potential impact on litigation affecting matters of substantial public interest. The route pursued by Mr. Jurnove can be replicated by any would-be plaintiff seeking to impose his view of animal welfare on the many entities regulated under the Animal Welfare Act. By finding conditions of which he disapproves in any public or private zoo, such a person will be able to initiate litigation affecting regulations broadly applicable to many medical research facilities as well as zoos. The impact on medical research is potentially severe

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are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 827-35 (1985). The district court found that the USDA enforcement decision was not reviewable, *see* 934 F. Supp. at 62-64, and the ruling was not appealed.

[10] Standing is often absent when a plaintiff sues the government over a harm inflicted by a third party, particularly when existing laws *prohibit* the conduct that inflicted the harm. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

because of the uncertainty such litigation would impose on the regulatory rules under which research institutions must function.

More broadly, the decision below permits plaintiffs to claim constitutionally adequate aesthetic injury in numerous situations previously thought to be outside federal court jurisdiction. Allegations of emotional distress, inherently incapable of objective verification, can now be used to confer standing in the unusually broad category of regulatory cases that may be brought in the District of Columbia. The plaintiff will need to do no more than assert his view of what a regulator should require and then claim emotional distress upon observing conditions that do not conform to that view.

A would-be plaintiff's sense of "good taste" and "beauty" – the essential determinants of aesthetic pleasure[11] – might entail placement of animals in brightly colored cages or no cages at all; or the exclusion of automobiles from national parks; or the placement or exclusion of handrails on mountain trails; or even the use of ornamental rather than grey scaffolding around the Washington Monument during periods of restoration. The decision below could even extend standing to an individual who seeks removal of religious figures from murals on the walls of the Supreme Court, or to someone who objects to the size of patients' rooms in Veteran's Administration hospitals – all on the ground that observing these conditions "assaults" the plaintiff's "senses" and produces feelings of "dismay and sadness."

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[11] *See* American Heritage Dictionary of the English Language 28 (3d. ed. 1996).

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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